Supreme Court, U.S.
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No. _____

In the

Supreme Court of the United States

October Term, 1994

KATHRYN MOSER and NATIONAL ASSOCIATION OF TELECOMPUTER OPERATORS,

Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION, a federal agency, and JAMES H. QUELLO, in his capacity as Chairman of the Federal Communications Commission,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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May 5, 1995

QUESTION PRESENTED

By prohibiting the use of automatic dialing-announcing devices (ADADs) for commercial speech, while authorizing the Federal Communications Commission to allow the use of ADADs for noncommercial speech, does the Telephone Consumer Protection Act of 1991, Pub. L. No. 102-243, 105 Stat. 2394-2402 (1991), violate petitioners' First Amendment right to engage in truthful commercial speech under the test set out in *Central Hudson Gas & Elec. Corp. v. Public Service Com'n*, 447 U.S. 557 (1980), or their right to the equal protection of the laws protected by the Fifth Amendment?

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Respondents.

PETITION FOR WRIT OF CERTIORARI

Petitioners Kathryn Moser and National Association of Telecomputer Operators respectfully petition for a writ of certiorari to review a judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals for the Ninth Circuit is reported in 46 F.3d 970 (1995), and is reprinted in

the appendix, p. A-1, *infra*. The opinions of the United States District Court for the District of Oregon are reported at 826 F. Supp. 360 (D. Or. 1993) (granting permanent injunction) (A-13, *infra*) and at 811 F. Supp. 541 (D. Or. 1993) (granting preliminary injunction) (A-34, *infra*).

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on February 6, 1995. (A-1.) The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The Telephone Consumer Protection Act of 1991, Pub. L. No. 102-243, 105 Stat. 2394-2402 (1991), codified at 47 U.S.C. § 227 ("TCPA" or "the Act"), provides in pertinent part as follows:

> "(1) PROHIBITIONS. It shall be unlawful for any person within the United States -
>
> ****
>
> "(B) to initiate any telephone call to any residential telephone line using an artificial or prerecorded voice to deliver a message without the prior express consent of the called party, unless the call is initiated for emergency purposes or is exempted by rule or order by the Commission under paragraph (2)(B);

****

"(2) REGULATIONS; EXEMPTIONS AND OTHER PROVISIONS. The Commission shall prescribe regulations to implement the requirements of this subsection. In implementing the requirements of this subsection, the Commission --

****

"(B) may, by rule or order, exempt from the requirements of paragraph (1)(B) of this subsection, subject to such conditions as the Commission may prescribe --

"(i) calls that are not made for a commercial purpose; and

"(ii) such classes or categories of calls made for commercial purposes as the Commission determines --

"(I) will not adversely affect the privacy rights that this section is intended to protect; and

"(II) do not include the transmission of any unsolicited advertisement." 47 U.S.C. § 227(b).

The full text of the pertinent portions of the Act is reproduced in the Appendix, A-47, *infra*.

Pursuant to the authority given it to exempt "calls that are not made for a commercial purpose" from the prohibitions of the Act, the Commission promulgated rules that did just that. In a proceeding entitled *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, FCC 92-443, CC Docket No. 92-90 (released October 16, 1992), the Commission promulgated 47 C.F.R. § 64.1200. In pertinent part, that section reads as follows:

> "(a) No person may
>
> ****
>
> "(2) Initiate any telephone call to any residential telephone line using an artificial or prerecorded voice to deliver a message without the prior express consent of the called party, unless the call is initiated for emergency purposes or is exempted by § 64.1200(c).
>
> ****
>
> "(c) The term 'telephone call' in § 64.1200(a)(2) shall not include a call or message by, or on behalf of, a caller:
>
> "(1) that is not made for a commercial purpose,

"(2) that is made for a commercial purpose but does not include the transmission of any unsolicited advertisement,

"(3) to any person with whom the caller has an established business relationship at the time the call is made, or

"(4) which is a tax-exempt nonprofit organization."

STATEMENT OF THE CASE

A. Introduction

An automatic dialing-announcing device (ADAD) is a computer connected to a telephone line that can automatically dial telephone numbers without the assistance of a live operator, and then play a recorded message when the call is answered. Petitioners use ADADs to advertise their goods and services to residential telephone subscribers.

In this case, petitioners challenge those parts of the TCPA set out above, which prohibit the use of such machines for the transmission of truthful advertising messages from commercial users, but which authorize the FCC to permit the use of such machines for the transmission of all kinds of messages from noncommercial users and of advertising messages from nonprofit users.

B. Statement of Facts

In 1987, petitioner Kathy Moser, with her husband, Ronald Moser, started a chimney sweep business in Salt Lake City, Utah, using funds that Mrs. Moser had received when she took early retirement, as an alternative to being laid off, from her job as a technical assistant at US West. (Preliminary Injunction Hearing, December 17, 1992, Tr. at 11-12.) The Mosers first advertised their new business by means of newspapers and door-to-door flyers. That advertising was not cost-effective; their business was "deteriorating quickly," even though they started their business in the fall, "the busiest time of the year" for chimney cleaners. (*Id.* at 13.)

So the Mosers tried something else. Mrs. Moser testified:

> "We saw an ad for a telecomputer that would generate leads for us, so we took the last bit of capital we had on a rent-to-own basis to see if it would generate the leads that it said that it did. And so we rented a telecomputer for * * * one month to see whether it worked or not. The first week it made its rental payment." (*Id.* at 14.)

In August 1989, the Mosers moved to Oregon, for reasons relating to Mrs. Moser's health (*id.* at 15), and they now operate their business under the name AAA-1 Lucky Leprechaun in Salem, Oregon. (*Id.* at 13.) In their new location, they advertised with door-to-door flyers, with their

ADAD, and in the Yellow Pages. (*Id.* at 15.) Seventy percent of their business is generated through calls made by their two ADADs. Without the revenues generated by those machines, they would be unable to afford even the cost of advertising in the Yellow Pages. (*Id.* at 16-17.)

Mrs. Moser also uses her ADADs "for our church to call on social functions and activities. * * * When we use the computer, we get a lot more people out to our functions and various meetings." (*Id.* at 17.)

Each ADAD used by the Mosers can dial only one telephone number at a time, and it dials only those numbers that have been programmed into it by Mrs. Moser. She can program in entire exchanges (that is, all numbers beginning "224-" or "248-," for example), portions of exchanges, or individual numbers; "[i]t just depends on what *** I choose to do." (*Id.* at 18.)

She does not program into the ADADs the exchanges that contain the numbers for government offices, hospitals, or the local university. And in those exchanges that she does program into the ADAD, she deletes the numbers for any emergency services whose telephone numbers are within that exchange. (*Id.* at 18-19.) Earlier ADAD models did not have the technological capacity to omit any numbers in a given exchange; they would indiscriminately dial through the entire sequence. (Affidavit of Carl R. Kolker, November 7, 1992, ¶ 3.)

Mrs. Moser's machine is programmed so that "once it has dialed a number and someone has answered it and

hung up the telephone, it will never dial it again." That is true even if she has inadvertently programmed the same number into the ADAD more than once, for "there's a built-in safety in the machine that never allows it to dial more than once while that exchange is in there." (Tr. at 19-20.)

Early ADAD models could take up to 32 seconds to disconnect the line when a called party hung up the telephone, because they did so only after receiving a signal from the telephone company, but newer models disconnect immediately when the called party hangs up. (*Id.* at 29; Affidavit of Carl R. Kolker, February 18, 1993, ¶ 5.) Mrs. Moser uses the newer models. (Tr. at 20.)

The advertising message transmitted by Mrs. Moser's ADADs lasts 15 seconds (if the called party does not hang up), and it is followed by 15 seconds of blank tape for the called party to record a message. The total amount of time that Mrs. Moser's machines engage a telephone is thus 30 seconds, "and that's if the [called party] keeps it going themselves. *** Any time they hang up, it's terminated," and the computer releases the connection. (*Id.* at 21.)

Plaintiff National Association of Telecomputer Operators is an association of about 40 small business persons who use ADADs like Mrs. Moser's in their businesses. The members include a piano tuner, several carpet cleaners, insurance agents, and "a paraplegic Vietnam vet in Washington, D.C., that uses this exclusively for his business." (*Id.* at 21-22.)

Fewer than 10,000 ADADS are in operation today. (Kolker Affidavit, February 18, 1993, ¶ 2.) Most of them are used by small businesses like those of the petitioners.

C. Trial Court Proceedings

After an evidentiary hearing, the district court entered a preliminary injunction enjoining respondents from enforcing the prohibition on the use of ADADs to transmit commercial messages. (A-34 to A-46.)[1] Thereafter, the parties filed cross-motions for summary judgment. The district court granted petitioners' motion and denied respondents' motion, holding that the TCPA's restriction on commercial speech violates the First Amendment under the test set out in *Central Hudson Gas & Elec. Corp. v. Public Service Com'n*, 447 U.S. 557 (1980). (A-13 to A-33.) It entered a judgment permanently enjoining respondents from enforcing the TCPA's ban on the use of ADADs to transmit commercial messages.

D. The Decision on Appeal

The Court of Appeals reversed. (A-1 to A-12.)[2] Although the district court held that the distinction between commercial and noncommercial speech created by the TCPA

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[1] The district court had jurisdiction to hear the case under 28 U.S.C. § 1331.

[2] The jurisdiction of the Court of Appeals was invoked under 28 U.S.C. § 1291.

with respect to the use of ADADs was subject to the test for restrictions on commercial speech set out in *Central Hudson*, the Court of Appeals declined to apply that test. It reasoned as follows:

> "The statute does not distinguish between commercial and noncommercial calls, except as it makes reference to calls not made for a commercial purpose that the FCC is granted permission to exempt by regulation under conditions it may prescribe. This language is permissive, not mandatory. It in no way requires the FCC to adopt such exemptions by regulation, order or otherwise." (A-6 to A-7.)

The Court of Appeals therefore "conclude[d] that the statute should be analyzed as a content-neutral time, place, and manner restriction." (A-8.)

It is not clear why the Court of Appeals thought the "permissive" nature of Congress's directive to the FCC with respect to favored treatment for noncommercial speech should exempt the Act from the test set out in *Central Hudson*. The fact is that pursuant to the authority given it in the TCPA, the FCC *did* promulgate regulations that allow nonprofit and charitable speakers to use ADADs to call residential phone lines and play prerecorded messages. The FCC could *not* have made a distinction between commercial and noncommercial speech had it not been authorized to do so by the statute. The distinction was created by Congress, in the TCPA itself; the FCC merely put regulatory flesh on the statutory bones. Petitioners' First Amendment and equal

protection challenges were therefore properly brought against the statute itself, and the questions of law raised by those challenges are properly presented to this Court by this petition.

REASONS FOR GRANTING THE PETITION

I. By prohibiting the use of ADADs for commercial speech while authorizing the FCC to allow the use of ADADs for noncommercial speech, the TCPA violates the First Amendment and the equal protection component of the Fifth Amendment. In upholding the statutory scheme, the Court of Appeals departed from this Court's recent decisions that recognize the value of commercial speech and its entitlement to substantial First Amendment protection.

A. There Is No Reasonable Fit Between the Government's Interest in Protecting Residential Privacy and Its Decision to Ban the Use of ADADs for Commercial Advertising Messages But Not for Noncommercial Messages.

The sections of the TCPA challenged in this case impose restrictions on commercial speech. The effect of 47 U.S.C. § 227(b)(1)(B), read in conjunction with 47 U.S.C. § 227(b)(2)(B)(i) and the FCC regulations promulgated thereunder, is to prohibit only one very narrow class of activity: the use of a prerecorded voice to initiate a telephone call transmitting an advertising message to a private residence by a profit-making person or entity. The TCPA thus allows all speakers (those with profit-making motives and those with nonprofit motives alike) to use ADADs to convey messages that do not contain advertisements, but it prohibits profit-making persons from using ADADs to transmit advertisements for their goods and services.

The governmental interest identified by Congress in support of this restriction on the use of ADADs was the protection of residential privacy.[3] Despite the fact that unsolicited telephone calls bearing noncommercial solicitations (for a charitable or political cause, for example) are no less an intrusion into residential privacy than telephone calls bearing commercial solicitations, Congress authorized the FCC to allow the use of ADADs for the former, while prohibiting their use for the latter.

This discrimination against commercial speech violates the First Amendment. Under *Central Hudson*, a restriction on commercial speech may be upheld only if "it is not more extensive than is necessary to serve [a substantial governmental] interest." 447 U.S. at 566. "It [is the government's] burden to establish a 'reasonable fit' between its legitimate interests *** and *** the means chosen to serve those interests." *City of Cincinnati v. Discovery Network*, ___ U.S. ___, 113 S. Ct. 1505, 1510, 123 L. Ed. 2d 99 (1993). "[S]ince [the government] bears the burden of justifying its restrictions, it must affirmatively establish the reasonable fit we require." *Board of Trustees of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 480 (1989).

Respondents failed to sustain that burden, because they did not establish that there is a reasonable fit between Congress's stated goal of protecting residential privacy, and the means it chose to accomplish that goal: namely, a

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[3] *See* the statement of congressional "Findings" to that effect, set out in Section 2 of the TCPA (A-47 to A-49, *infra*), especially subparagraphs (5), (9), (12), and (13).

prohibition on the use of ADADs for commercial speech, but not for noncommercial speech. Indeed, the district court determined that there was no fit at all; it rejected respondents'

> "*** bald assertion that banning commercial solicitations but not nonprofit solicitations furthers the protection of residential tranquility. Both kinds of telemarketing calls trigger the same ring of the telephone; both kinds of calls invade the home equally, and both risk interrupting the recipient's privacy equally." (A-28.)

That conclusion was clearly correct. The TCPA authorized the FCC to permit a charitable group like the Association of Retarded Citizens to use an ADAD to solicit the purchase of light bulbs, but it prohibits Kathy Moser from using her ADAD to solicit the purchase of light bulbs. Similarly, the TCPA authorized the FCC to permit Kathy Moser to use her ADAD to invite people to her church functions (and she does use it for that purpose; Preliminary Injunction Hearing Tr. at 17), presumably even if those functions included such money-raising activities as bake sales or holiday bazaars, but it prohibits her from using it to invite her neighbors to her own Tupperware party or garage sale.

Obviously, all of these telephone calls are equally intrusive, and the proposition that a ringing telephone's peremptory summons from the dinner table or the bath or the bridge game is somehow "intrusive" if the person who answers it hears a recorded message for a chimney sweep

company, but that it is not "intrusive" if the person hears a recorded message soliciting a contribution for a charity or a college or an arts organization or the governor's reelection campaign, is absurd.[4]

Moreover, the findings contained in the TCPA itself lend no support to a conclusion that consumers are bothered more by computer-generated prerecorded telephone calls from commercial speakers than by similar calls from non-commercial speakers. Thus, paragraph 10 of the Findings in Section 2 of the TCPA asserts that "[e]vidence compiled by the Congress indicates that residential telephone subscribers consider automated or prerecorded telephone calls, *regardless of the content or the initiator of the message*, to be a nuisance and an invasion of privacy," while paragraph 13 states that "the evidence presented to Congress indicates that automated or prerecorded calls are a nuisance and an invasion of privacy, *regardless of the type of call* ***." TCPA, Section 2, ¶¶ 10, 13 (emphasis added). (A-48, A-49.) Despite that evidence, Congress decided that the FCC "should have the flexibility" to exempt noncommercial calls from its prohibition on the use of ADADs. *Id.*, ¶ 13.

The *only* explanation for the distinction between commercial and noncommercial speech in the TCPA thus lies in the low value Congress apparently placed on com-

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[4] As the district court put it, "all telemarketing calls, regardless of whether they are introduced by operators, or on behalf of a charity, or deliver a prerecorded message, threaten the privacy that Congress is striving to protect. *** Congress is attempting to ban totally a form of commercial speech, for the sake of reducing only slightly the number of telephone solicitations." (A-31, A-32.)

mercial speech. As *Discovery Network* shows, however, government may not justify a distinction between commercial and noncommercial speech simply by asserting that the former has a lower value than the latter. In *Discovery Network*, this Court said that it was "unwilling to recognize Cincinnati's bare assertion that the 'low value' of commercial speech is a sufficient justification for its selective and categorical ban on [one type of] newsracks ***." 113 S. Ct. at 1516. Cincinnati's ordinance therefore violated the First Amendment, for "[n]ot only does Cincinnati's categorical ban on commercial newsracks place too much importance on the distinction between commercial and noncommercial speech, but in this case, the distinction bears no relationship *whatsoever* to the particular interests that the city has asserted." *Id.* at 1514 (emphasis in original). The city's argument to the contrary, the Court said, was based on "the fallacy" that commercial publications were somehow greater contributors to visual blight than were noncommercial publications. *Id.* at 1515.

The same conclusion is appropriate here. The TCPA, too, places "too much importance on the distinction between commercial and noncommercial speech," and here, too, "the distinction bears no relationship" to the government's interest, for the distinction made by the TCPA between commercial and noncommercial uses of ADADs bears no relationship to the statute's purported goal of protecting residential privacy. The peremptory ring of a telephone is no more and no less intrusive, and no more and no less disruptive of whatever activity may be occurring in the home, if it is Kathy Moser's ADAD asking whether someone would like to have a chimney cleaned, or if it is Kathy

Moser's ADAD soliciting someone to come to her church's car wash or rummage sale, or soliciting someone to buy Girl Scout cookies.

The Court in *Discovery Network* also noted that "if there are numerous and obvious less-burdensome alternatives to the restriction on commercial speech, that is certainly a relevant consideration in determining whether the 'fit' between ends and means is reasonable." 113 S. Ct. at 1510 n.13.[5] There is no doubt that Congress could have addressed its concern for residential privacy by adopting "alternatives" that are "less-burdensome" than prohibition of ADADs. For example, Congress could have restricted the use of ADADs to certain hours or to certain days, or it could have limited the frequency of their use, by limiting the number of calls each ADAD can make or by limiting the number of times it can call any particular residential number

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[5] *Accord Rubin v. Coors Brewing Co.*, ___ U.S. ___, 63 U.S.L.W. 4319, 4323-24 (1995) ("the availability of [other regulatory alternatives], all of which could advance the Government's asserted interest in a manner less intrusive to respondent's First Amendment rights, indicates that [the challenged restriction on commercial speech] is more extensive than necessary").

in a given period.[6] The availability of these "less-burdensome alternatives" to achieve Congress's goal shows that "the 'fit' between ends and means" in the TCPA is not reasonable.

Finally, the Court in *Discovery Network* also rejected the city's argument that the "justification" for its ordinance could salvage an otherwise improper time, place and manner regulation:

> "*** We agree with the city that its desire to limit the total number of newsracks is 'justified' by its interest in safety and esthetics. The city has not, however, limited the number of newsracks; it has limited (to zero) the number of newsracks *distributing commercial publications*. As we have explained, there is no justification for that particular regulation other than the city's naked assertion that commercial speech has 'low value.' It is the absence of a neutral justification for its selective ban on newsracks that prevents the city from defending its newsrack policy as content-

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[6] Respondents asserted in the court below that "Congress found *** that prerecorded messages frequently tie up telephone lines and leave extended, unwanted messages on answering machines." (Brief for the Appellants, No. 93-35686 (9th Cir.) at 24.) However, the evidence in the record here was undisputed that newer ADAD models do not cause those problems (Kolker Affidavit, February 18, 1993, ¶¶ 2-5), and a "narrowly tailored" regulation would obviously be one that prohibited the use of the kind of ADADs that cause the problem, not the kind that do not.

neutral." 113 S. Ct. at 1517 (emphasis in original).

That analysis is equally applicable here. Even if Congress's desire to limit telephone calls could be justified by an interest in protecting residential privacy, Congress has not limited the number of unsolicited and intrusive telephone calls; indeed, it has not even limited the number of unsolicited *commercial* telephone calls. All it has done is to limit (to zero) the number of commercial telephone calls made for advertising purposes by ADADs. Nonprofit organizations and politicians can continue to use ADADs to make unsolicited calls, and even the vast majority of commercial calls (those made by live operators, those made by predictive dialers (that is, computers that dial numbers and switch to a live operator when the call is answered), and those made by ADADs operated by charitable and political groups) are untouched by the TCPA, and can continue to proliferate, unrestrained. There is no "neutral justification" for the "selective ban" on the use of ADADs by one narrow class of users.

B. The TCPA's Ban on the Use of ADADs for Commercial Advertising Violates Petitioners' Equal Protection Rights Under the Fifth Amendment.

The district court did not reach petitioners' equal protection claim, having sustained their challenge on First Amendment grounds. Petitioners preserved that claim in the Court of Appeals, as an alternate ground for affirming the judgment, but although the Court of Appeals acknowledged that petitioners had made such a claim, *see infra*, A-6, that court reversed the judgment without addressing it.

"The Equal Protection Clause requires that statutes affecting First Amendment interests be narrowly tailored to their legitimate objectives," *Police Dept. of Chicago v. Mosley*, 408 U.S. 92, 101 (1972),[7] and this Court has at least twice applied that principle to invalidate restrictions on expression. In *Mosley* itself, the Court struck down a statute that prohibited pickets and demonstrations within 150 feet of a school during school hours, but exempted "peaceful picketing" of any school involved in a labor dispute. The Court found that the city's goal, "preventing school disruption," was "legitimate," *Id.* at 99-100, but that the city's means to achieve that goal was not narrowly tailored, since it prohibited one kind of picketing while allowing another kind of picketing that had just as much potential for disruption. "Far from being tailored to a substantial governmental

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[7] "This Court's approach to Fifth Amendment equal protection claims has always been precisely the same as to equal protection claims under the Fourteenth Amendment." *Weinberger v. Wiesenfeld*, 420 U.S. 636, 638 n.2 (1975).

interest, the discrimination among pickets is based on the content of their expression. Therefore, under the Equal Protection Clause, it may not stand." 408 U.S. at 102 (footnote omitted).

The Court followed and applied the *Mosley* analysis in *Carey v. Brown*, 447 U.S. 455 (1980). The statute at issue in *Carey* prohibited the picketing of residences, but exempted peaceful picketing of any residence that was also a place of employment involved in a labor dispute. The government argued that it could ban the nonlabor-related picketing "under the guise of preserving residential privacy." *Id.* at 462. The Court rejected that argument:

> "*** [T]he exclusion for labor picketing cannot be upheld as a means of protecting residential privacy for the simple reason that nothing in the content-based labor-nonlabor distinction has any bearing whatsoever on privacy. Appellant can point to nothing inherent in the nature of peaceful labor picketing that would make it any less disruptive of residential privacy than peaceful picketing on issues of broader social concerns. Standing alone, then, the State's asserted interest in promoting the privacy of the home is not sufficient to save the statute." *Id.* at 465.

The Court concluded that the statute violated the Equal Protection Clause because it "discriminate[d] among pickets based on the subject matter of their expression." *Id.* at 471.

That analysis is fully applicable here. Just as the governments in *Mosley* and in *Carey* could not identify anything inherently more disruptive in one type of picketing than in another, respondents here can point to nothing that renders prerecorded commercial messages inherently more intrusive than other types of telemarketing messages delivered to the home over the telephone lines. A prerecorded message advertising a car wash to benefit a school soccer team is no less intrusive than a prerecorded message advertising a commercial car wash. Nothing in the distinction between these two kinds of messages "has any bearing whatsoever on privacy." By banning the use of ADADs for commercial purposes, while authorizing the FCC to permit the use of ADADs for noncommercial purposes, the TCPA therefore violates the equal protection component of the Fifth Amendment.

II. Restrictions on the use of ADADs for commercial speech have become widespread and are the subject of conflicting lower court decisions. This Court should grant a writ of certiorari to address the important question presented.

Congress and at least 42 state legislatures have enacted laws that either ban ADADs altogether or substantially restrict their use, particularly for commercial purposes. Lower court judges have reached conflicting conclusions as to the constitutionality of these restrictions. In addition to the district court in this case, two other courts have sustained constitutional challenges to telemarketing statutes that make the kind of commercial/noncommercial

distinction that is at issue here. *Lysaght v. State of New Jersey*, 837 F. Supp. 646 (D. N.J. 1993) (preliminary injunction issued against New Jersey statute on First Amendment grounds; converted to permanent injunction by Consent Order entered April 20, 1995); *Moser v. Frohnmayer*, 315 Or. 372, 845 P.2d 1284 (1993) (Oregon statute invalidated on state constitutional free expression grounds). In addition to the Court of Appeals in this case, one other court has rejected the constitutional challenge. *State v. Casino Marketing Group, Inc.*, 491 N.W.2d 882 (Minn. 1992), *cert. denied sub nom Hall. v. Minnesota*, 113 S. Ct. 1648 (1993).

Taken together, the state and federal restrictions are "virtually sounding the death knell for all commercial uses of automatic dialers across the country." Note, *What About the Lucky Leprechaun?: An Argument Against "The Telephone Consumer Protection Act of 1991,"* 1991 Colum. Bus. L. Rev. 417, 420. The facts of this case, however, show that many small business owners depend heavily on the use of ADADs for the success of their business operations, and the TCPA's prohibition on the use of these machines to transmit advertising messages represents a serious threat to the free speech interests of these entrepreneurs.

By prohibiting the use of ADADs in the name of protecting residential privacy, and then authorizing the FCC to allow their use for all kinds of noncommercial messages that are equally intrusive into residential privacy, Congress--like the City of Cincinnati, in enacting its newsrack ordinance--has "seriously underestimate[d] the value of commercial speech." *Discovery Network*, 113 S. Ct. at 1511. And by rejecting petitioners' challenge to the con-

stitutionality of the discrimination against commercial speech contained in the TCPA, the Court of Appeals gave short shrift to the

> "societal interests in broad access to complete and accurate commercial information that First Amendment coverage of commercial speech is designed to safeguard. *** The commercial marketplace, like other spheres of our social and cultural life, provides a forum where ideas and information flourish. Some of the ideas and information are vital, some of slight worth. But the general rule is that the speaker and the audience, *not the government*, assess the value of the information presented." *Edenfield v. Fane*, ___ U.S. ___, 113 S. Ct. 1792, 1798, 123 L. Ed. 2d 543 (1993) (emphasis added).

Kathy Moser's experience shows that when given the opportunity, many consumers *do* respond favorably to advertising messages transmitted by ADADs. Now, however, Kathy Moser can no longer use her ADAD to communicate truthful and useful advertising messages. The drastic impact that the TCPA will have on the livelihood of small business persons like Mrs. Moser, the statute's unwarranted hostility toward commercial speech, and the conflicting lower court decisions concerning the constitutionality of the kind of restrictions authorized by the TCPA, are all factors justifying this Court's review of the Ninth Circuit decision in this case.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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